ORIGINAL FILED
December 29 2009
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA-09-0578

HERMAN GONZALES; FAWN LYONS; KEN LAUDATO; LAWRENCE WALKER; GARY MANSIKKA; GARY GALETTI; GREG WHITING; MARVIN KRONE; RICHARD BLACK; JIM KELLY; CHRIS SOUSLEY, and all others similarly situated,

Plaintiffs and Appellees,

v.

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MONTANA POWER COMPANY; NORTHWESTERN CORPORATION, a Delaware Corporation; PUTMAN AND ASSOCIATES, INC., a Montana corporation; NORTHWESTERN ENERGY; NORTHWESTERN CORPORATION d/b/a NORTHWESTERN CORPORATION as a reorganized debtor, subsequent to its plan confirmation, herein after referred to as NOR; and JOHN DOES II and III and JOHN DOES IV thru XX,

Defendants and Appellant.

DEFENDANT NORTHWESTERN CORPORATION AS A REORGANIZED DEBTOR'S RESPONSE TO APPELLEE'S MOTION FOR SUSPENSION OF THE RULES AND REINVESTMENT OF LIMITED JURISDICTION

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NorthWestern Corporation, as a reorganized debtor, subsequent to its bankruptcy plan confirmation, and also referred to in this matter as "NOR," the Appellant above-named, submits this response opposing Appellees' Motion for Suspension of the Rules and Reinvestment of Limited Jurisdiction.

Appellees seek an order from this Court investing jurisdiction in the District Court during the pendency of this appeal for purposes of "allowing the District Court and the parties to do their work concerning the notification process." *See* Appellees' motion at 3. Appellees also suggest, as they have over the past number

of years, that they need to conduct urgent discovery which has been "contemplated, but not implemented." *See id.* As the appeal filed in this Court addresses the impropriety of the class definition and of having a class at all, the Appellees' request to conduct class notice procedures should be rejected as it would serve little purpose and be wasteful should the Defendants' appeal be upheld.

Further, Appellees have repeatedly suggested a need to conduct discovery during the past several years of this litigation, and failed to conduct such discovery. Notably Appellees fail to specify any particular discovery they need to conduct during the pendency of this appeal, and further fail to suggest why that discovery has not been done during the past 10 plus years this case has been ongoing. Appellees' motion should be denied.

A. Jurisdiction Should Not be Reinvested to the District Court to Conduct Notice Proceedings Pending Resolution of this Appeal.

Appellees do not dispute that this Court's rules expressly provide for an interlocutory appeal from a District Court's order granting class certification. *See* Mont. R. App. P. 6(3)(d). Appellees also recognize that in Montana once a notice of appeal is filed, the District Court loses jurisdiction. *See* Appellees' Brief at 5, citing *In re: Marriage of Dreesbach* (1994), 265 Mont. 216, 228-229, 875 P.2d 1018, 1025-1026.

Despite recognition of this rule and law, Appellees look to Fed. R. Civ. P. 23(f), which is not analogous to Montana's Rule 23 or any Montana rule. The Federal rules do not provide for a mandatory interlocutory appeal of class certification orders, but rather Fed. R. Civ. P. 23(f) provides that a federal court of appeals "may permit an appeal" for a class certification order. Federal R. Civ. P. 23(f) further provides that an appeal from a class certification order does not automatically stay class proceedings. In the federal context, this makes sense as the federal appellate courts have discretion whether or not to hear the merits of an appeal from a class certification order and in many cases do not hear the appeal. Thus, staying ongoing proceedings where the appeal will never be heard would be inefficient at best.

Further, while irrelevant to this case as the federal rule has no analogous Montana counterpart, as Appellees note the federal courts will authorize a stay during appeal from class proceedings if certain criteria are met. *See* Appellees' motion at 4. Appellees gloss over these criteria, suggesting their opinion that the District Court's certification order will not be reversed on appeal. However, as NOR has already shown in response to Appellees' first motion to suspend the rules, the problems with the District Court's certification order are readily ascertainable. Among the problems are the District Court's class definition, which is an impermissible "fail-safe" class, which would require a determination on the

merits of the plaintiff's claims prior to determining who is and who is not a member of the class. Of course, this impermissible "fail-safe" class definition, which should be reversed on appeal, will affect the very class notice and class notification process which Appellees are suggesting this Court should allow to proceed pending this appeal. NOR contends that allowing class notice issues to be addressed pending the outcome of this appeal will be wasteful where the class definition suffers such serious flaws.

Furthermore, NOR contends on appeal that the individualized issues required to be determined in order for each proposed class plaintiff to prove their bad faith and related claims and damages makes class certification inappropriate at all. Thus, it would be wasteful to work on class notice requirements where the issue on appeal is whether there can appropriately be a class at all.

B. Appellees' Request to Conduct Discovery Should be Rejected.

During the course of this litigation, the Appellees have routinely responded to the defendants' motions by suggesting a need to conduct additional discovery. For example, when NOR's counsel sought to withdraw from representation of some defendants, the Appellees objected claiming a need to conduct additional discovery. At a hearing on May 13, 2008, the District Court inquired from Appellees' counsel why NOR's counsel should not be allowed to withdraw, to which Appellees' counsel responded, "Well, I think the issue is discovery, your

Honor." *See* May 13, 2008 Trans. At 44:2-3. The District Court indicated that Appellees had failed to conduct discovery in the several months since NOR's counsel's first motion to withdraw had been denied. *See id.* at 44:10-11. Appellees' counsel responded, "Yeah, that's true, your Honor." *Id.* at 44:12. When Appellees continued to insist that discovery was needed, the District Court responded, "I'm finding it a shallow argument that makes me angry. That motion has been pending for over four years, all right. I want to know in relation to this what your plan is in relation to this law firm. You've sat here for four months. You haven't done anything, and you're telling me to deny this motion." *Id.* at 44:23-25; 45:1-4. Other than a generic claim of need for discovery, Appellees could identify no specific discovery they intended to conduct. *Id.* at 43-58.

Now again, Appellees suggest a generic need for discovery which admittedly was"contemplated, but not implemented" should alter the course of this appeal. Appellees again fail to identify any particularly discovery they need to conduct, or why it has not already been conducted over the past years, and in particular in the past couple of years since Appellees began telling the District Court they had urgent discovery to conduct. Further, Appellees do not explain any reason why waiting to do this "contemplated" discovery until after appeal would cause them any harm.

Again, the issues on appeal deal with the impropriety of a class at all, and the impropriety of the District Court's ordered class definition. Both of these issues, which should be resolved in this appeal, will assist the District Court and all parties in defining the scope of what is permissible discovery in this litigation. Thus, resolution of the class certification issues by this Court will assist in conducting efficient and appropriate discovery, and all other pre-trial matters. It goes without saying that requiring defendants to participate in class-wide discovery if no class is maintained on appeal would be a wasteful and inefficient use of the defendants' limited resources.

Appellees have failed to show any legitimate reasons why this Court should take the extraordinary course of allowing the District Court case to proceed on the very issues which are to be resolved on appeal. Appellees' motion should be denied.

CONCLUSION

For these reasons, Appellees' Motion for Suspension of the Rules and Reinvestment of Limited Jurisdiction should be denied.

Dated this 29th day of December, 2009.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By 

Chad E. Adams

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of December, 2009, I mailed a true and correct copy of the above and fore going by the United States Postal Services, postage prepaid, addressed to the following counsel of record:

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